In the

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

CENTRAL NATIONAL BANK OF CLEVELAND,
Trustee u/a with EDWIN G. THOMPSON, deceased,
Petitioner,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Your Petitioner, Central National Bank of Cleveland, Trustee u/a with Edwin G. Thompson, deceased, respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Nature of the Lawsuit.

In order to present clearly the extraordinary ruling of the Circuit Court of Appeals, from which this appeal is taken, it is necessary to summarize briefly the nine-year history of this case.

This is an action, in contract, upon an insurance policy issued by the respondent, to recover, on behalf of the named beneficiary the double indemnity promised by the words of

the policy, if the death of the insured should occur by "external, violent and accidental means * * *"

The insured, Edwin DeGroot Thompson, was shot to death. He was shot by a jealous and embittered husband, who had earlier threatened Thompson's life. When he was killed, Thompson was calmly on his way, despite the threats, to attempt to talk the killer out of a proposed alienation of affections suit, and had just reached the steps of the killer's home when he was struck and killed by a bullet fired at him through the screen door of the house.

Without detailing the thousand bizarre facets of this story as it appeared in the words of the witnesses, the central question of the whole controversy is, "Did Thompson come to his death accidentally; or did he practically commit suicide by walking into a known and reasonably certain fate?"

The Judicial History of the Case.

Upon the first trial, the jury disagreed (R. p. 316).

Upon the second trial, the District Court directed a verdict for the defendant, the present respondent, at the end of *all* the evidence (R. pp. 9, 316). This was reversed by the Circuit Court of Appeals, which held that the evidence was such as to require the issues to be submitted to the jury. See *Central National Bank of Cleveland v. General American Life Insurance Co.*, 105 Fed. (2d) 878 (1939).

At the third trial, the jury returned a verdict for the plaintiff, the present petitioner. At this point, the series of rulings with which this petition is concerned began.

The defendant filed a double-barrelled motion, asking the District Court to grant judgment for the defendant notwithstanding the verdict, or, in the alternative, to grant a new trial (R. p. 283).

With rather obvious regret, the District Court denied both branches of this motion, and entered judgment for

the plaintiff upon the verdict. (See Memorandum Opinion, R. p. 285.) The Circuit Court had said that the evidence presented at the second trial presented issues which must be submitted to a jury. At the third trial, the District Court found the evidence to have been substantially the same (R. 287). Therefore, considering itself bound by the decision above (that the case presented a jury question), the District Court overruled the defendant's motion, not only as to judgment notwithstanding the verdict, *but also as to the defendant's request for a new trial* (R. p. 289).

The defendant appealed. The record was printed; briefs were submitted to the Circuit Court of Appeals; and the cause was argued on its merits by counsel. The Circuit Court, however, neither affirmed nor reversed the judgment below. Instead it sent the case back to the District Court for the single purpose of having the lower court *rule again* on the defendant's motion for new trial. The result of such ruling was then to be certified to the Circuit Court in a supplemental record, which, with the record already before the upper court, would be considered in the decision upon the merits. (Opinion of the Circuit Court of Appeals, R. p. 316, also reported in 136 Fed. (2d) 821 (1943).)

The reason stated by the Circuit Court for this resubmission of the motion for new trial to the District Court, was that the District Court had taken an erroneous view of the former decision upon appeal. The Circuit Court now said (R. p. 318):

> "It is apparent that the view of the lower court was that our former opinion required it not only to overrule the motion for judgment n.o.v., but the motion for new trial as well. This was erroneous."

The Circuit Court of Appeals then pointed out in substance that a motion for new trial could be granted, even though the case was properly sent to the jury, if the judge in his independent judgment considered a new trial necessary because of error. Because of the former decision, the

trial judge had, however, considered himself bound to overrule any motion for new trial automatically. This view was not correct, so the upper court sent the cause back to have the lower court complete the record, by exercising his independent judgment *upon the motion for new trial.*

After the motion was thus properly ruled upon, the ruling was to be added to the record upon appeal, and the original appeal by the respondent would then proceed.

Up to this point, the petitioner concedes that no error occurred in these rulings. Beyond this point, however, error was as obvious as it was inexplicable.

Two more rulings remain to be discussed.

The first is the action of the District Court upon resubmission.

The District Court did two things in a single order (R. p. 307). It granted the defendant's motion for new trial. In addition, it reconsidered the defendant's motion for judgment notwithstanding the verdict. This, too, it granted most emphatically, upon all twelve grounds asserted. In doing so, the District Court ignored not only the words of the Circuit Court of Appeals, but also the obvious generic difference between a motion for new trial and a motion for judgment notwithstanding the verdict. Unlike the motion for new trial, a motion for judgment n.o.v. could not be granted in view of the Circuit Court's previous decision that the evidence as a whole (including both plaintiff's and defendant's evidence) presented a question that must be decided by the jury, and not by the court.

The case was sent back for a ruling *only* upon the motion for new trial. The District Court granted a new trial and added, gratuitously, a ruling uncalled-for, upon the motion for judgment. The date of this ruling was November 2, 1944.

These further proceedings below were then certified in a supplemental record to the Circuit Court of Appeals,

which assigned the case for argument specifically upon "the effect of the order of the District Court entered November 2, 1944" (R. p. 6).

New briefs were submitted and oral argument had. The Circuit Court of Appeals on July 16, 1945, entered the following order, from which this petitioner seeks to appeal. With the Court's indulgence, the petitioner sets forth in full this brief order (R. p. 320):

> "This cause was heard upon the transcript of record, including the supplemental transcript filed May 7, 1945, briefs and re-argument of counsel; and it appearing that the judgment of the District Court, entered pursuant to the mandate, issued July 30, 1943, is equivalent in substance to the granting of a new trial for the reasons and upon the grounds set out in the memorandum opinion of the District Court filed August 21, 1943, and in the order of the court based on the memorandum entered November 2, 1944; and the court being of the opinion that there is no reversible error in vacation and setting aside the judgment appealed from,
>
> "IT IS THEREFORE ORDERED AND ADJUDGED, that the judgment for plaintiff be and the same is reversed and the case remanded with directions to the District Court to dismiss the action."

This is the order now appealed from. Petitioner objects not to any granting of a new trial, but to the final clause of this order, "with directions to the District Court to dismiss the action." It is the position of the petitioner that the District Court received the case back with power, at the most, to grant a new trial; that it clearly and outrageously exceeded that power and rendered final judgment for the respondent; and that the Circuit Court of Appeals countenanced and ratified such conduct by ordering the dismissal of petitioner's action—not as a result of any decision upon the merits of the respondent's pending appeal, but solely upon the basis of the unlawful action of the District Court.

II.

JURISDICTIONAL STATEMENT.

The judgment complained of was rendered by the Circuit Court of Appeals on July 16, 1945. The jurisdiction of this Court to review this decision is asserted under Section 240, Judicial Code; Title 28, Section 347, United States Code Annotated.

It is believed that this jurisdictional right to supervise the conduct of Circuit Courts of Appeals is the same as that presented by *Century Indemnity Co. v. Nelson*, 303 U. S. 213, 82 L. Ed. 755, 58 S. C. 531 (1938), and *Miller v. Hatfield*, 309 U. S. 1, 84 L. Ed. 535, 60 S. C. 374 (1940).

III.

THE QUESTIONS PRESENTED.

The questions presented are:

(1) Upon a limited or partial remand by the Circuit Court of Appeals, for the sole purpose of obtaining a ruling upon a motion for new trial, may the District Court step completely outside the limits of the mandate and attempt to throw the plaintiff out of court, by granting final judgment for the defendant?

(2) When the District Court does so exceed the limitations of the mandate of the upper court, may the Circuit Court of Appeals affirm and ratify this unlawful action?

(3) The Circuit Court of Appeals has not retreated from its twice-announced holding that the facts of this particular lawsuit present questions to be decided by a jury. Is it not palpable error for the Circuit Court of Appeals then to permit the District Court to decide these questions of fact without a jury?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner asserts but a single ground for the allowance of the writ. This ground is set forth in Rule 38 (5) (b) of this Court:

> "Where a circuit court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's supervisory powers."

Here the petitioner is entitled to a jury decision upon the facts of this case. This is established by the previous decision of the Circuit Court of Appeals in this same case. Without in any way retracting or modifying the nature of that decision, the Circuit Court of Appeals has now sanctioned an unlawful determination by the District Judge of this jury question.

This is the net result of the confused hodge-podge of rulings by District and Circuit Courts, ending in the order of the Circuit Court of Appeals commanding the dismissal of the petitioner's action. The petitioner has simply been denied the right to a trial by jury—although the two published opinions of the Circuit Court of Appeals in this very case assert the petitioner's right to have the issues of fact decided by the verdict of the jury.

Petitioner believes that its predicament clearly satisfies the requirements of the quoted portion of Rule 38, and that a writ should be allowed; the decision of the Circuit Court of Appeals reversed; and the case should be sent back to the District Court for a new trial.

Dated: October 11, 1945

M. C. Harrison,

Attorney for Petitioner, Central National Bank of Cleveland, Trustee u/a with Edwin G. Thompson, deceased.